

TAN TENG PAN v. WONG FOOK SHANG

[O.C.J. (Yong J.) October 9, 1972]

[Kuala Lumpur — Originating Summons No. 133 of 1972]

Land Laws — Sale of land — Order of — Jurisdiction — Whether court has, where land held under land office title — National Land Code, ss. 260 & 261(1).

The chargee in this application sought for an order of sale of land held under E.M.R. in the Mukim of Klang for the recovery of the sum of \$6,000 due by the chargor to the chargee under a charge presentation which was duly registered by the Collector of Land Revenue, Klang.

The question was whether the court had jurisdiction to entertain the application when the land in question was land held under a land office title.

Held: in view of the provisions of sections 260 & 261(1) of the National Land Code, the court had no jurisdiction to entertain the application.

ORIGINATING SUMMONS.

Teh Eng Choon for the chargee-applicant.

Respondent in person.

Yong J.: This is an application by a chargee for an order of sale of the land held under E.M.R. (Entry Mukim Register) No. 8048 for lot 6611 in the Mukim of Klang for the recovery of the sum of \$6,000 due by the chargor to the chargee under a charge presentation No. 1206, Volume XXX Folio 87 which was duly registered by the Collector of Land Revenue, Klang.

The question is: Has this court jurisdiction to entertain this application when the land is land held under a Land Office title. Sections 260 and 261(1) of the National Land Code 1965 read:—

“260. (1) This section applies to land held under—

- (a) Land Office title or
- (b) the form of qualified title corresponding to Land Office title,

and to any lease of any such land.

(2) Any application for an order of sale under this Chapter by a chargee of any such land or lease shall be made to the Collector in Form 16G.”

“261. (1) Upon receiving any application under sub-section (2) of section 260, the Collector shall—

- (a) appoint a time and place for the holding of an enquiry with respect thereof;
- (b) notify the chargee of the time and place so appointed; and
- (c) cause a summons to be served on the chargor, requiring him to appear at the enquiry and show cause why the order should not be made.”

In view of these provisions I hold that this court has no jurisdiction to entertain this application which should have been made to the Collector of Land Revenue, Klang. This application is accordingly dismissed.

Application dismissed.

Solicitors: *S. Y. Chan & Co.*

A DEL E. WEBB INTERNATIONAL HOTEL CO. v. HOTEL MERLIN PENANG SDN. BHD.

[O.C.J. (Chang Min Tat J.) October 12, 1972]

[Penang — Civil Suit No. 222 of 1972]

Practice and Procedure — Consolidation of actions — R.S.C. 1957, O. 49 r. 8(1).

B This was an application by the defendants under the provisions of O. 49 r. 8(1) of the Rules of the Supreme Court for consolidation of this action with another instituted in Kuala Lumpur.

C The plaintiffs are an American company having for its main object or one of its main objects the provision of hotel-expertise. They entered into agreements with various owners of hotel-buildings in many countries for running these hotels at a remuneration and for a stated term. These hotels though belonging to different owners should constitute or be seen to constitute a chain with presumably intimate connections with one another, so that a visitor to the Hotel Merlin in Kuala Lumpur would naturally gravitate to the Hotel Merlin in Penang on a visit to the latter place. The procedure then developed for these owners to turn themselves into companies, each known under the common name of Merlin but which constitute separate juridical entities. The contract of management was in each case identical almost to the letter, and in point of fact had been described by one of the plaintiff company's officers as a package deal.

D A term of the agreement was that the right of rescission on 6 months notice by either side was deferred for 5 years after November 1, 1970, but insofar as the Penang action was concerned, it was terminated by notice dated August 11, 1972 before the expiry of the 5 years period, and served the following day with almost immediate effect. The statement of claim averred that the termination was without just cause and in breach of the agreement and that consequent on the termination, the defendants had unlawfully taken over the management and operation of the hotel.

E The defendants' secretary in his affidavit alleged that the termination was for breaches of the contract by the plaintiffs and for misrepresenting themselves as experts in hotel business which, it was alleged they were not, in view of the mass of evidence purported to have been uncovered of their incompetence and that of their agents or servants and that this misrepresentation or lack of the skill they held themselves out to possess was a fundamental breach of the implied term of the contract. The defendants claimed thereby to be entitled to bring the contract to an end before the stipulated time. In support of the application for consolidation, he averred that the writs of summons and statements of claim in both the Penang and the Kuala Lumpur actions were identical. He made the further point that without consolidation there would be unnecessary duplication of work.

F **Held:** (1) an examination of the claim and the averments in the affidavits in this case showed that the actions in Kuala Lumpur and in Penang were between the same plaintiffs and substantially the same defendants, though of different legal entities and what was more important, involved a common question of facts;

H (2) in the circumstances this was a case eminently suitable for consolidation with the Kuala Lumpur action within the scope and intent of O. 49 r. 8.

Cases referred to:—

- (1) *Horwood v. Statesman Publishing Co. Ltd.* (1929) 98 L.J.K.B. 450, C.A.
- (2) *Daws v. Daily Sketch & Sunday Graphic Ltd. & Anor., etc.* [1960] 1 All E.R. 397.
- (3) *Dominion Trust Co. v. New York Life Insurance Co., Dominion Trust Co. v. Mutual Life Assurance Co. and Dominion Trust Co. v. Sovereign Life Assurance Co.* [1919] A.C. 254.
- (4) *Khalid Panjang & Ors. v. Public Prosecutor (No. 2)* [1964] M.L.J. 108.

CIVIL SUIT.

P. Mooney (*Abdullah Yusof* with him) for the plaintiffs.

M. Shankar (*C. Abraham* with him) for the defendants.

Chang Min Tat J.: This is an application by the defendants under the provisions of Order 49 rule 8(1) Rules of the Supreme Court for consolidation of the action herein with another instituted in Kuala Lumpur. The rule is couched in these words

"8(1) Two or more actions may be consolidated by order of the court or a judge, when such a course appears necessary or advisable."

I am satisfied on the provisions of sub-rules (2) and (3) that the application for consolidation with the Kuala Lumpur action to be thenceforth carried on in Kuala Lumpur is properly made in Penang. The plaintiffs make no point on this but however resist the application strenuously.

The corresponding rule in England refers to consolidation by order of the court or a judge in the manner in use immediately before 1 November 1875, in the Superior Courts of Common Law. It has been held in *Horwood v. Statesman Publishing Co. Ltd.*,⁽¹⁾ as stated in the footnote (h) at page 389 of *Halsbury's Laws of England* (3rd Edition) Vol. 30, that this rule must be interpreted in the light of the changes of rules as to joinder of parties and causes of action. Since we have adopted these changes in our Rules of the Supreme Court, this must mean that the English law on consolidation is applicable to our courts. So far as the practice in England is concerned, it has been summarised in the same volume of *Halsbury's Laws* thus:

"Actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and different defendant, or between the same plaintiff and different defendants, or between different plaintiffs and the same defendant or between different plaintiffs and different defendants may be consolidated on the application of either a plaintiff or a defendant."

If this is the practice to be adopted in our country, our local rule serves only to make clearer that an order is at the discretion of the judge, to be exercised when such a course appears necessary or advisable. But the exercise of any discretion must of course be a judicial one and in this connection, I propose to bear in mind these words of Scrutton L.J. in *Horwood v. Statesman Publishing Co. Ltd.*, *supra*, which were repeated with approval by Willmer L.J. in *Daws v. Daily Sketch & Sunday Graphic Ltd. and Anor.*, *Darke & Others v. Same*⁽²⁾ at page 399:

"The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

It appears that apart from the Kuala Lumpur action with which it is sought to consolidate this, there

A are at least two other actions, one in Singapore and the other in Hongkong, instituted by the same plaintiffs. With these latter two, I am not really concerned but the submissions touched on them and they do give a certain understanding of the action.

The plaintiffs are an American company having for its main object or one of its main objects the provision of hotel-expertise. To achieve this, they entered into agreements with various owners of hotel-buildings in many countries for running these hotels at a remuneration and for a stated term. Now there is an obvious economic advantage that these hotels though belonging to different owners should constitute or be seen to constitute a chain with presumably intimate connections with one another, so that a visitor to the Hotel Merlin in Kuala Lumpur will naturally gravitate to the Hotel Merlin in Penang on a visit to the latter place. The procedure then developed for these owners to turn themselves into companies, each known under the common name of Merlin but which constitute separate juridical entities though there might well be some association between them. It also followed that the contract of management was in each case identical almost to the letter. There is a possible difference in the term of years but essentially it was of the same nature and in point of fact had been described by one of the plaintiff company's officers as a package deal.

A term of the agreement of management was that the right of rescission on 6 months' notice by either side was deferred for 5 years after 1 November 1970. but insofar as the Penang action is concerned, it was terminated by notice dated 11 August 1972 before the expiry of this period of 5 years, and served the following day, with almost immediate effect. The statement of claim averred that the termination was without just cause and in breach of the agreement and that consequent on the termination, the defendants had unlawfully taken over the management and operation of the hotel.

The defence of the defendants has still to be filed, but in the meantime, in the course of the several applications for an injunction, for setting it aside, for another injunction (Encl. 11) and for consolidation (Encl. 13), several massive affidavits were filed, full of accusations and counter-accusations. To these affidavits even more bulky exhibits were annexed. Quite a few of these exhibits were affidavits and annexures relating to the other actions in Kuala Lumpur, Singapore and Hongkong.

For myself I am somewhat doubtful about the correctness of my referring to the affidavits, charges and counter charges filed or laid in the other actions, with the possible exception of the action in Kuala Lumpur. I am of course primarily concerned with the action in Penang and I propose to limit myself to the affidavits filed in connection with the Penang action.

In his affidavit (Encl. 7) of 28 August (filed in support of the application to set aside the *ex-parte* injunction granted by me in the first instance) Ng Sing Hwa the group accountant and company secretary of Merlin Hotels (Malaysia) Bhd. and Hotel Merlin Penang Sdn. Bhd. the defendants herein, in paragraphs 13, 15,

16 and 17 thereof, alleged that the termination was for breaches of the contract by the plaintiffs and for misrepresenting themselves as experts in hotel business which, it was alleged they were not, in view of the mass of evidence purported to have been uncovered of their incompetence and that of their agents or servants and that this misrepresentation or lack of the skill they held themselves out to possess was a fundamental breach of the implied term of the contract. The defendants claimed thereby to be entitled to bring the contract to an end before the stipulated time.

Next in his affidavit in support of the application for consolidation, the same Ng Sing Hwa averred that the writs of summons and statements of claim in both the Penang and the Kuala Lumpur actions were identical. He made the further point that without consolidation, there would be unnecessary duplication of work.

In a further affidavit filed on 13 September the said Ng Sing Hwa repeated the charges of misrepresentation as experts and the failure to provide the necessary expertise. And he contended that the breaches of the plaintiff company of the agreement were fundamental and went to the root of the contract so that the defendants were entitled to treat the contract as at an end and there was a total failure of consideration.

One George Milne, the plaintiff company's representative in West Malaysia, holding as he said the position of General Manager Malaysia of the plaintiff company affirmed two affidavits which were filed on 25 September but which, it is to be noted, signally failed to refute the charges and the reasons on which the defendants grounded their action, except for the last paragraph in his second affidavit in which he contented himself with a general denial that there had been fundamental breaches of the agreement or at all. No attempt was made to descend to any details.

On the next day, 26 September Lim Foo-Yong, who described himself as the founder of Merlin Hotels and the Managing Director of Merlin Hotels (Malaysia) Bhd., Hotel Merlin Sendirian Berhad, Hotel Merlin Singapore Limited and Hotel Merlin (Hong Kong) Limited, affirmed an affidavit with numerous enclosures. The resistance to this application for consolidation was based almost entirely on the averments in this affidavit and on the contention that these averments were irrelevant and highly prejudicial. But with respect, it appears to me that this affidavit was meant to meet the plaintiffs' case for an injunction and had no real relevance to the question of consolidation.

However on 29 September the plaintiff company filed two affidavits, one affirmed by H. W. Cronrath presently of Singapore and the Vice-President and Regional Director of the plaintiff company and the other by M. Frampton, resident at Kuala Lumpur and the executive Vice-President and in charge of operations of the plaintiff company. In these affidavits they went to some details in refuting not merely the charges of breaches of the agreement and of the lack of expertise but also of the complaints made particularly by Lim Foo-Yong of various activities both personal and professional of various members of the plaintiff company's organisation which were said to be prejudicial to the best interests of the hotels. Before that however the

A affidavits filed on behalf of the plaintiff company had dealt mainly with various manoeuvres and meetings on the break-up of the relationship between the parties.

So far I have somewhat scrupulously avoided mention or consideration of matters connected with the Singapore and the Hongkong actions and particularly I have refused to ingest any allegations of a personal nature. This is because by and large, and with respect, I agree with the contention of Mr. Mooney, learned counsel for the plaintiff company that what happened in one place might not be relevant in another or be admissible in evidence or might be so highly prejudicial that the probative value of such evidence must be doubted.

C It also seems to me that these affidavits have all been composed in great haste in an effort either to obtain or to discharge the injunctions sought and that having regard to the defence that has so clearly emerged in the several affidavits, though no statement of defence had hitherto been filed, the defendants will be or must be held to their charges of misrepresentation of owning an experience and an expertise which they dispute the plaintiff company as having and the incompetence of their appointees, servants or agents. Mr. Shankar, learned counsel for the defendant company, has stated that he has his case ready and he knows what it is. He is, I accept without hesitation, of sufficient experience and knowledge, to be able to conduct his case without infringing the strict code of evidence we are bound by. If he should attempt to introduce evidence that is not strictly admissible or relevant, I am confident that a strenuous objection will be immediately made and I am equally confident that the trial judge will decide this point fairly and strictly in accordance with the law of evidence. For myself, I venture to think that the allegations in Lim Foo-Yong's affidavit of 26 September made, as I consider, in a hurry will not be made use of, as on a fuller consideration, they may be seen not to be at all relevant to the defences so far raised.

F It could of course be said that there is no certainty that the defendants will not raise such matters which are of a very personal nature against the appointees of the plaintiff company as part of their case. For myself, I would presume to feel confident, in the expectation I have of the Bar in general and of counsel in this case in particular, that it will be possible to separate and in the conduct of the case, attention will be directed to the necessity of separating the wheat from the chaff.

G H In these circumstances, the facts that the writs of summons and the statements of claim in the Penang and Kuala Lumpur actions are couched in precisely the same terms and the defence, as discerned in the earlier affidavits before the descent into personalia, would appear to be identical and depend largely on the application of a common set of facts (if the personalia are excluded) to their legal effect on the contract of management assume great significance. Mention is also made of the facts that the same solicitors and counsel act in both cases, and they and the main witnesses are resident in the same place but though these make for convenience and the saving of costs, they are, to my mind, not pertinent. But clearly the ex-

amination of the claim and the averments in such of the affidavits I have considered as pertinent to my decision must show that the actions in Kuala Lumpur and in Penang are between the same plaintiffs and substantially the same defendants, though of different legal entities and what is more important involve a common question of facts.

It is however submitted that the case of *Dominion Trust Co. v. New York Life Insurance Co.*, *Dominion Trust Co. v. Mutual Life Assurance Co.* and *Dominion Trust Co. v. Sovereign Life Assurance Co.*⁽³⁾ being a decision of the Privy Council is binding on me and that I should heed the somewhat strong criticism of the decision at first instance to consolidate the actions. Quite obviously, I must and I do accept the proposition that a decision of the Privy Council on a law which though from another country is *in pari materia* with our law is binding not only on me but on every court in the land: see *Khalid Panjang & Ors. v. Public Prosecutor (No. 2)*.⁽⁴⁾ I also accept that the practice in Canada from which the *Dominion Trust Company* cases came is the same as in Malaysia. But, with respect, a reading of the judgment of the Privy Council shows that the criticism of the order for consolidation was directed to the fact that the defences to the claim on the deceased's life insurance policies were on the grounds of misrepresentations or non-disclosures in the applications which were different from one another. Nonetheless their Lordships of the Privy Council instead of setting aside the order and sending the cases back to be tried separately found a common defence which was that the deceased died from his own hand and by a common provision in the policies, suicide of the insured put the insurers out of risks and allowing the appeal, their Lordships found for the insurers. This case therefore does not appear to me to be any authority against consolidation.

Lastly it is said that the law is different, that while in Penang the common law of England applies, in Kuala Lumpur the relevant law is the enacted law in the Specific Relief (Malay States) Ordinance 1950. There are admittedly certain differences in the law, but by and large the Specific Relief (Malay States) Ordinance 1950 is a codification of the English law and if and when the differences in the law apply to this case, I am confident that counsel will assist the trial court in applying the correct law and the court will not meet with any difficulty in doing so. But for myself, I very much doubt if such differences as there are in the law are of any application in this case.

It therefore seems to me that this is a case eminently suitable for consolidation with the Kuala Lumpur action within the scope and intent of Order 49 rule 8, and I so order. I also direct that this action shall henceforth be carried on in the Kuala Lumpur action, and the title amended accordingly in terms of Order 49 rule 8(3).

Costs to be costs in the cause.

I would indicate that if dissatisfaction is felt over this decision of mine, I would not require arguments and would certify to that effect.

Order accordingly.

**PALANIAYEE & ANOR. v.
TOH WHYE TECK REALTY LTD. & ANOR.**

[O.C.J. (Wan Suleiman J.) October 17, 1972]

[Seremban — Civil Suit No. 139 of 1968]

Master and Servant — Vicarious liability for servant's negligence — Res ipsa loquitur.

Negligence — Co-employee — Whether master vicariously liable in negligence — Res ipsa loquitur.

This was an application brought on behalf of the estate of one Sangili, who died of an accident whilst he and the second defendant in the course of their employment were felling a rubber tree in the estate belonging to the first defendant. The plaintiffs alleged that this accident which led to the deceased's death was due to the negligence of the second defendant and therefore his employer the first defendant was vicariously liable.

The plaintiffs sought *inter alia* to rely upon the doctrine of *res ipsa loquitur*.

Held: (1) on the facts it was clear that the fatal injury had resulted from the deceased being struck by the tree which the second defendant with the deceased had felled. The question of defendant's negligence must therefore be determined on the evidence, so that the doctrine of *res ipsa loquitur* became inapplicable;

(2) the evidence showed the system of precautions required to be taken by the defendants was adequate in so far as the deceased was concerned;

(3) as the deceased failed to take the simple precaution required the resulting accident must be attributed solely to his negligence.

Cases referred to:-

- (1) *Barkway v. S. Wales Transport Co.* [1950] A.C. 185.
- (2) *Bolton v. Stone* [1951] A.C. 850.
- (3) *Fardon v. Harcourt Rivington* [1932] All E.R. 81.
- (4) *Ng Cheng Ho v. Tan Ek Seng & Anor.* [1969] 2 M.L.J. 107.
- (5) *Colfar v. Coggins & Griffith (Liverpool) Ltd.* [1945] 1 All E.R. 326.

CIVIL SUIT.

Gurdial Bakan Singh for the plaintiffs.

Stanley Ponniah for the defendants.

Wan Suleiman J.: This is an action brought on behalf of the estate of Sangili s/o Palaniandy, who died of an accident whilst he and the second defendant in the course of their employment were felling a rubber tree on the estate belonging to the first defendant.

The plaintiffs allege that this accident which led to his death had been due to the negligence of the second defendant and that therefore his employer the first defendant was vicariously liable.

Only the second defendant and deceased were present at the scene of the fatal accident.

The plaintiffs called Sinnan s/o Sadayan to give evidence of the manner in which tree felling operations were conducted on the estate. Like the deceased he had also assisted second defendant, (who was the only one on the estate who did actual felling with a mechanical chain-saw), and like the deceased was employed in this overtime capacity solely to lop off branches of trees felled by second defendant, whilst the latter would himself cut up the trunks into shorter lengths for use in the smoke house. No branches